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February 2, 1998

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20008

Re: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, CS Docket No. 97-248, RM No. 9097

Dear Ms. Salas:

On behalf of EchoStar Communications Corporation ("EchoStar"), enclosed please find for filing an original and six copies of EchoStar's Comments in the above-captioned matter.

Also enclosed is an additional copy of EchoStar's Comments which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Marc A. Paul
Counsel for EchoStar Communications Corporation

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	RM No. 9097
Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION

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Dated: February 2, 1998

SUMMARY

EchoStar Communications Corporation ("EchoStar") hereby files these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter. EchoStar is a Direct Broadcast Satellite ("DBS") distributor with three operational satellites, offering over 100 video and audio channels to subscribers throughout the United States. Ever since it started operations in March 1996, EchoStar has made a Herculean effort to compete against cable operators on price and quality. At every turn, however, this effort has been hampered by the practices of cable-affiliated programming vendors that are the subject of this rulemaking. Many of these vendors: have denied EchoStar access to popular programming carried on cable that is necessary for a more cable-competitive offering; have offered programming on terms and conditions that make it almost prohibitive to carry; or have exacted discriminatory price and non-price terms that substantially drive up EchoStar's costs compared to those of its cable competitors.

The higher prices that EchoStar typically has to pay cable-affiliated programming vendors for satellite programming threaten to seriously "squeeze" EchoStar's margins. To compete against cable, EchoStar has decided to offer its MVPD packages at substantially lower prices than comparable cable packages, while at the same time its programming costs are driven higher by its competitors' affiliates. To preserve and enhance the price and quality competition from EchoStar and other MVPD distributors, the Commission must vigorously enforce its program access rules and tighten them in several critical respects. The Commission must renew the vigor with which it enforces these rules and not tolerate any evasion of its rules by cable affiliated programmers, consistent with the letter of the Congressional mandate in this area as well as the underlying congressional intent.

The unfair programming practices described above have led EchoStar to file three Complaints against cable-affiliated program vendors. While EchoStar appreciates the availability of the Commission's processes, it does not take them lightly and would rather not need to resort to these complaint proceedings. Unfortunately, however, such recourse is necessary because the program access rules have not had the desired deterrent effect on illegal programming practices. The reasons for this are two-fold: first, the Commission has shown restraint in the type of sanctions within its authority that it has chosen to impose for program access violations. Cable vendors have taken this restraint as an indication that the rules have no enforcement "teeth." The Commission can rectify this problem by exercising its existing authority to award damages for program access violations.

Second, the rules do not provide for an adequate discovery process. This makes program access violations extremely difficult to prove and to remedy. In the complaint proceedings brought by EchoStar, the allocation of burdens provided by the Commission has helped to a certain degree. All three defendants have effectively conceded the facts that, in EchoStar's view, constitute the prohibited conduct (higher rates, discriminatory practices, exclusivity). For the most part, the defendants have contested only the characterization of these facts. Even in those cases, however, it is impossible without discovery to ascertain the precise extent of discrimination and fashion an appropriate remedy. All the information needed for that inquiry typically lies in the exclusive possession of the defendants. To cure this deficiency, the Commission should establish discovery as of right consistent with the federal discovery rules, subject to the Commission's role as the arbiter of discovery disputes. At a minimum,

the Commission should provide for discovery delineated by Commission orders, consistent with the Commission's recent rules governing Title II complaints.

Lastly, a worrisome phenomenon has recently emerged whereby cable-affiliated vendors are increasingly resorting to fiber transmission of their programming in an attempt to evade the program access prohibitions. To tackle this potential loophole, the Commission should interpret the statutory definition broadly to include fiber transmission if feeds containing the same programming are also transmitted by satellite. In any event, the Commission has ample authority to close this loophole consistent with its own precedent and case law from other analogous areas. In program access proceedings, the Commission can define as a rule violation any use of fiber transmission whose primary purpose is to avoid enforcement of the program access rules, and create a rebuttable presumption that fiber or microwave transmission is evasive. The defendant would then be free to rebut that presumption by producing evidence of a legitimate business purpose justifying the use of alternative transmission facilities.

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COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION

EchoStar Communications Corporation ("EchoStar") hereby files these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter.[1] EchoStar is a Direct Broadcast Satellite ("DBS") distributor with three operational satellites, offering over 100 video and audio channels to subscribers throughout the United States. Ever since it started operations in March 1996, EchoStar has made a Herculean effort to compete against cable operators on price and quality. At every turn, however, this effort has been hampered by the practices of cable-affiliated programming vendors that are the subject

[1] Implementation of the Cable Television Consumer Protection and Competition Act of 1992/Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CS Docket No. 97-248, RM No. 9097 (rel. Dec. 18, 1997) ("Program Access NPRM").

of this rulemaking. Many of these vendors: have denied EchoStar access to popular programming carried on cable that is necessary for a more cable-competitive offering; have offered programming on terms and conditions that make it almost prohibitive to carry; or have exacted discriminatory price and non-price terms that substantially drive up EchoStar's costs compared to those of its cable competitors.

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The unfair programming practices described above have led EchoStar to file three Complaints against cable-affiliated program vendors.[2] EchoStar hopes that adoption of the rules discussed below will significantly enhance the Commission's program access rules, thereby

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[2] See EchoStar Communications Corporation v. Rainbow Media Holdings, Inc. et al., File No. CSR-5127-P (filed Oct. 14, 1997); EchoStar Communications Corporation v. Fox/Liberty Networks, LLC et al., File No. CSR-5138-P (filed Oct. 27, 1997); EchoStar Communications Corporation v. fX Networks LLC et al., File No. CSR-5165-P (filed Nov. 24, 1997).

minimizing the need to file such complaints, and also ensure that Congress' goal of a competitive MVPD marketplace is reached.

I. THE COMMISSION SHOULD ADOPT DISCOVERY AS OF RIGHT FOR PROGRAM ACCESS COMPLAINTS

A. The Production of Documents in Program Access Proceedings Is Essential to Determining The Existence and Extent of Discrimination

EchoStar supports the use of discovery for program access proceedings, and believes that the adoption of "discovery as of right" would significantly facilitate proof of program access violations.[3] EchoStar recognizes that the Commission has declined to adopt discovery as of right for formal complaints filed against common carriers.[4] Nevertheless, the successful determination of a program access complaint (in contrast to formal complaints filed against common carriers) relies upon, in most instances, the production of information that is typically in the defendant's exclusive custody, such as agreements that the defendant has entered into with other MVPDs.

Discovery (and in particular document production) is required in order for the complainant to make its prima facie case and for the Commission to understand and determine whether there has been discrimination as to a rate, term or condition. Without it, the case must be decided solely on pleadings and affidavits, and will be reduced to one party's "word" against another's. Contracts between MVPDs and satellite cable programmers are almost always

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[3] EchoStar's proposed discovery rule is attached. See Exhibit 1.

[4] Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238, FCC 97-396 at ¶¶ 109-114 (rel. Nov. 25, 1997) ("Formal Complaint Order").

confidential and proprietary. Accordingly, without a right of discovery, there is no way for the complainant to obtain the information necessary to make its discrimination case. Instead, the complainant must rely upon voluntary disclosures by the defendant or public disclosures (if any), such as trade press reports, in order to make its case before the Commission. The defendant has every incentive, however, to withhold critical information from the complainant since there is effectively no sanction if the information is not provided.

In the case of the proceedings brought by EchoStar, the allocation of burdens provided by the current rules has admittedly helped on the question of whether there has been prohibited conduct: the defendants have effectively conceded the facts that in EchoStar's view constitute the prohibited conduct and have largely contested only the characterization of these facts. Nevertheless, the lack of discovery makes it virtually impossible to ascertain the full extent of the discrimination and fashion an appropriate remedy. The Commission's current rules do provide for an order compelling such discovery, and EchoStar has requested such orders. Nevertheless, the information requested will almost always be necessary, and so far the Commission has not often used its authority to compel discovery.

In these circumstances, discovery as of right would help to clarify the discriminatory conduct and the extent to which it is being employed against a complainant by allowing for the orderly disclosure of pertinent information.[5]

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[5] Further, a detailed computation of damages cannot be made by the complainant without access to certain documents that are likely to be in the sole possession of the defendant. See infra at Section II.C.

EchoStar recognizes that discovery as of right might require more Commission involvement and possibly interfere with the expeditious disposition of program access matters.[6] In order to minimize Commission involvement, EchoStar suggests that the Commission adopt principles from the Federal Rules of Civil Procedure (the "Federal Rules") to regulate discovery. While the adoption of these principles would not completely eliminate the Commission's involvement, it would significantly reduce its impact on resources: the federal discovery rules are well-known and well-litigated in U.S. courts, providing solid guidance for the Commission and the parties. Indeed, other agencies have adopted the Federal Rules to govern discovery: the Surface Transportation Board, for example, recently eliminated the prior approval requirement for obtaining document discovery and instead aligned its document production rules to the federal discovery process.[7]

In any event, discovery as of right will not require any additional Commission involvement or be more time-consuming than "Commission controlled" discovery or, indeed, discovery requests under the current rule. Under the Federal Rules, the agency is only the arbiter of last resort, in cases where the parties disagree. Under the current system, the Commission has to make a discovery judgment as a threshold matter before discovery may proceed. Indeed, as mentioned above, EchoStar has had to file Motions to Compel Discovery in two of its pending

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6 Program Access NPRM at ¶ 44.

7 See STB Ex Parte No. 527 at 9-10 (served Oct. 1, 1996).

complaint proceedings in an effort to obtain documents critical to determining the extent of the discriminatory conduct against it.[8]

To the extent that the Commission is unwilling to adopt discovery as of right, EchoStar encourages the Commission to adopt a policy in favor of document production in program access disputes that are based upon discrimination as to rates, terms and/or conditions when the defendant is unwilling to provide the necessary documents. Without the production of documents in these cases (in particular the agreements that vendors have with MVPDs competing with the complainant), it is difficult, if not impossible, for the Commission to determine the extent of the discrimination. As the Commission has recognized, a defendant's "pricing information will play an integral role in a vendor's ability to justify rate differences between competing distributors."[9] While the Commission's rules allow a potential complainant to make a certified request for this information, these requests are time consuming and generally have not been successful. Discovery as of right would significantly enhance the ability of a complainant and the Commission to determine the existence and extent of discrimination by program vendors.

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[8] See EchoStar Communications Corporation v. Rainbow Media Holdings, Inc. et al., File No. CSR-5127-P (filed Oct. 14, 1997); EchoStar Communications Corporation v. Fox/Liberty Networks, LLC et al., File No. CSR-5138-P (filed Oct. 27, 1997). EchoStar sought to acquire this information both prior to and at the time of filing its program access complaints, but the defendants in both matters were unwilling to provide this information on a confidential basis or otherwise.

[9] Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 3359, 3410 (1993) ("Program Access Order").

EchoStar supports the Commission's proposal to require the submission of discovery requests at the same time that the complaint is filed.[10] EchoStar notes, however, that the Commission would need to allow the complainant to make additional discovery requests, as necessary, at the time the complainant files its Reply. These supplemental discovery requests would be made in light of any information and documents that are (or are not) revealed by the defendant with its Answer. To allay any concerns that defendants may have concerning the disclosure of confidential information, EchoStar has no objection to the Commission's proposal to use a protective order.[11]

II. THE IMPOSITION OF DAMAGES AS A REMEDY WILL PROVIDE A DETERRENT TO VIOLATORS AND ENCOURAGE SETTLEMENTS AND COMPETITION IN THE MVPD MARKET

A. The Commission Has Authority To Impose Damages for Program Access Violations

The Commission has correctly recognized that it has the authority to impose damages for program access violations. "[T]he Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor."[12] Although initially declining to impose a damages remedy, the Commission noted that "the

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10 Program Access NPRM at ¶ 42.

11 Id. at ¶ 43.

12 47 U.S.C. § 548(e).

statute's grant of power to the Commission to award appropriate remedies is broad enough to include damages. . . ."[13]

So far the Commission has chosen to impose relatively minimal sanctions on a programmer found to violate the Commission's program access rules. While mandating access or requiring the prospective adjustment of cable rates are significant remedies, they do not hold the violator responsible for its past anti-competitive conduct. Accordingly, these remedies are not proving to be a sufficient deterrent to violations of the program access law. Indeed, one of the defendants subject to an EchoStar complaint has already been found to have violated the program access rules on at least two other occasions.[14]

The Commission must confirm that its program access rules have enforcement "teeth." It should use its damage authority where appropriate, just as it uses that remedy in other complaint proceedings within the Commission's jurisdiction.[15] The imposition of a damages

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[13] Implementation of the Cable Television Consumer Protection and Competition Act of 1992/Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd. 1902, 1911 (1994) ("Program Access Reconsideration Order").

[14] See Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc., DA 97-2040 (rel. Sept. 23, 1997) (granting a program access complaint with respect to price discrimination and discrimination in marketing requirements); Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation, DA 97-1452 (rel. July 1, 1997) (finding that Rainbow discriminated by refusing to sell its programming to Bell Atlantic).

[15] See 47 U.S.C. §209 ("If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay the complainant the sum to which he is entitled. . . ."); 47 C.F.R. §1.722.

remedy, in all pending and future program access cases, would not only act as a significant deterrent to prohibited conduct, but it would remedy the real competitive harm suffered by MVPDs, like EchoStar, which have been subject to discriminatory and anticompetitive conduct. In addition, the possibility of substantial damages will encourage parties to settle matters prior to filing a complaint with the Commission.

It should be noted, however, that a rulemaking is not necessary for the Commission to impose damages in any pending program access cases. Instead, the Commission can simply decide to use its pre-existing authority to assess damages. The Communications Act specifically gives the Commission the authority to determine appropriate remedies – including damages – "upon completion of [an] adjudicatory proceeding."[16] Accordingly, with respect to any program access complaint, including those currently pending, if the Commission determines that damages are warranted, it already has the authority at its disposal to impose this remedy.

B. Damages Should be Calculated from the Date Which The Violation First Occurred

With respect to the pertinent period for calculation of damages, the Commission has requested comment on "whether the operative date should be the date of the notice of intent to file a program access complaint . . . or the date of filing of the program access complaint, or the date on which the violation first occurred."[17] Consistent with the Commission's own damages precedent, damages should be calculated from the date on which the violation first

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16 47 U.S.C. § 548(e) (emphasis supplied).

17 Program Access NPRM at ¶ 46.

occurred, and should not be tied to the date upon which the complaint or notice is filed with the Commission.

The Commission must endeavor to hold violators responsible for prohibited actions that detrimentally affect competition in the MVPD market. Requiring violators to comply with the law only in a prospective manner or its practical equivalent (i.e., from the date the complainant gives notice or files its complainant) simply encourages violators to "test the limits of the law" and engage in cost/benefit calculations when deciding whether to proceed with discriminatory conduct.[18] A stiff economic penalty calculated from the date of the violation would ensure that the offending entity is held responsible for each and every day of its unlawful conduct.

C. The Calculation of Damages Should be Streamlined

The Commission should determine damages on a case-by-case basis, following principles previously enunciated in common carrier complaints. With respect to certain types of prohibited practices, the Commission should adopt presumptions to aid and streamline damage calculations.

Certain presumptive techniques for proving damages appear to be appropriate, for example, in all cases where an affiliated vendor or cable operator has impermissibly entered into an exclusive contract, refused to deal with an MVPD, or has engaged in unfair practices which hurt the competitive ability of the complainant. In such cases, the complainant should be able to meet its burden of proving damages by statistical studies on the percentage of MVPD viewers

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[18] Petition for Rulemaking of Ameritech New Media, Inc. at 22 (May 16, 1997).

who do not subscribe to the aggrieved MVPD's offering on account of the lack of the programming in question.

Other program access violations are also conducive to the adoption of presumptions to streamline damage calculation. For example, a reasonable presumption in the case of price discrimination would be that the damage award should include, at a minimum, the difference between the price charged to the complainant and the price charged to the favored MVPD multiplied by the number of subscribers on the basis of which the vendor assessed the discriminatory price.[19] At the same time, the complainant would be free to try to prove that its harm actually exceeded that differential, and the defendant would be given the opportunity to rebut the presumption.

EchoStar also supports the use of a "supplemental complaint" process to account for damages that cannot be calculated at the time of filing a complaint. As in the recently adopted "supplemental complaint" process for formal complaints filed against common carriers, at the time of filing the complaint, the complainant would explain its inability to calculate damages due to a lack of information, and propose the methodology it would use upon receiving the required information.[20] Upon receiving the required information, the complainant would file its "supplemental complaint" setting forth the damages to which the complainant believes it is

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[19] This calculation would then be made over the time period from which the discriminatory price was enforced or offered through the resolution of the program access complaint by the Commission.

[20] Program Access NPRM at n. 132.

entitled.[21] Without adopting such a process, the Commission would impose a burden upon the complainant that is impossible to satisfy since the information necessary for making a damage presentation is most frequently within the possession of the defendant.

III. THE COMMISSION MUST ADOPT REGULATIONS TO DETER THE EVASION OF THE PROGRAM ACCESS RULES THROUGH OFFERING PROGRAMMING OVER TERRESTRIAL FACILITIES

EchoStar is extremely concerned with the increasing phenomenon of cable affiliated programming transmitted by fiber. As a recent program access complaint effectively demonstrates, the anticompetitive tactic of using terrestrial delivery to avoid program access obligations is a real concern.[22] Further, the decision to use fiber is typically hard to justify on cost grounds. One possible reason cable programmers may use fiber is the evasion of the

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[21] Accordingly, EchoStar supports Americast's proposal to bifurcate the program access liability determination from the damages or forfeiture determination. Id. at ¶ 46. EchoStar agrees that, in most cases, it will be more efficient to determine liability separately from damages. Indeed, prior to the conclusion of the liability proceeding, the information necessary for a damages determination is not likely to be available. To combine the two proceedings may delay and confuse the liability determination. By providing for the commencement of the damages proceeding at the conclusion of the liability proceeding (or when the missing information becomes available), the Commission will improve the efficiency of the program access proceeding. EchoStar points out, however, that bifurcation should not be used as an excuse by a defendant not to comply with a reasonable discovery request. Information pertinent to the damages determination is likely to be relevant for the liability determination as well. Further, bifurcation should not be required, but rather should be in the discretion of the Commission in order to accommodate instances where the determination of liability and damages can easily be made in the same proceeding.

[22] See Complaint of DirecTV at 10-11 (filed Sept. 23, 1997) (filed in DirecTV, Inc. v. Comcast Corporation et al., File No. CSR-5112-P)(providing a discussion of the measures that cable operators, including Comcast Corporation, are undertaking to provide their programming on a terrestrial basis in an apparent effort to avoid program access obligations)

program access rules, which define the covered programming by reference to satellite transmission.

The Commission has several means within the statute to prevent such evasive conduct. First, the Commission should interpret the statutory definition broadly: "transmitted by satellite" is not limited in terms of when the transmission occurred or who effected it. If certain programming was formerly transmitted by satellite, a subsequent switch to fiber transmission should not matter. By the same token, if certain programming is contained in a satellite feed for out-of-market distribution, the use of fiber to transmit the same programming to cable operators should not disqualify it as "satellite cable programming."[23] Such an interpretation is mandated by the purpose of the program access law -- to enhance the competitiveness of MVPDs, other than cable operators, by providing access to cable programming at nondiscriminatory rates, terms and conditions.[24]

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[23] Notably, the rules define satellite cable programming no matter who transmits the programming by satellite. See 47 C.F.R. § 76.1000(h).

[24] See Program Access Order, 8 FCC Rcd. at 3362 ("In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public."). In the words of Rep. Tauzin, the program access law was intended to prevent cable operators from "deny[ing] programming completely to those competitors to make sure they cannot sell a full package of services. So the hot shows are controlled by cable. The good shows, the good programs only come to you on the cable." 138 Cong. Rec. H6534 (July 23, 1992). As stated in the House Report accompanying H.R. 4850 (the House bill including the program access provisions), "[t]he access to programming language is the only truly competitive portion of the cable bill. Effective competition is the key to lower rates and better service for consumers in the multichannel video distribution market place." H.R. Rep. No. 102-628, at 165-66 (1992).

Second, even if the statutory definition were to be construed more narrowly, the Commission doubtless has the authority to prevent evasion of its rules. [25] In other areas, the Commission and other agencies have taken appropriate action where a party seeks to avoid its statutory obligation and duties.[26] In accordance with that precedent, the Commission should alert vendors that it will regard non-satellite transmission as evasive when its primary purpose is to avoid the prohibitions of the program access rules.

Third, the Commission should adopt a rebuttable presumption that the primary purpose of using fiber in lieu of satellite feeds is evasive unless proven otherwise. For the most part, terrestrially delivered programming, especially fiber, is more expensive than satellite delivery. Accordingly, the burden should be on that programmer to explain and justify its use of

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[25] The Commission correctly recognized its jurisdiction over these evasive tactics in a prior Report and Order. Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, 11 FCC Rcd. 18223, 18325 n. 451 (1996).

[26] See In the Matter of Amendment of Part 62 of the Commission's Rules, 59 R.R.2d 1036 ¶ 5 (1986) (recognizing the Commission's ability to "'pierce the corporate veil' on an appropriate record to prevent carriers from using corporate structure to avoid their statutory obligations under the Communications Act."). The Internal Revenue Service has adopted "anti-avoidance rules" in an effort to thwart the purposeful avoidance of its regulations. See, e.g., Treas. Reg. §1.1502(e)(1) ("If any person acts with a principal purpose contrary to the purposes of this section, to avoid the effect of the rules of this section or apply the rules of this section to avoid the effect of any other provision of the consolidated return regulations, adjustments must be made as necessary to carry out purposes of this section."). The Federal Trade Commission has adopted regulations which specifically ignore transactions and devices adopted with the purpose of avoiding notification of the antitrust authorities, as required under the Hart-Scott-Rodino Act. See 16 C.F.R. § 801.90 (1997).

the more expensive technology.[27] Moreover, the information necessary for such an inquiry is in the custody of the vendor.[28]

IV. CONCLUSION

For the foregoing reasons, EchoStar believes the Commission should adopt the following rules to enhance the effectiveness of the program access complaint process: (1) discovery as of right should be adopted in all program access complaint proceedings; (2) the Commission should use its preexisting authority to impose damages (calculated from the date of the violation) against cable programmers and cable operators found to violate the program access provisions; and (3) the Commission should adopt a presumption that the cable programmer's decision to provide its programming on a terrestrial basis has been done to evade the program access restrictions. With these rules in place, EchoStar firmly believes that the Commission will be sending a stern message to cable operators and programmers that violations of the program access rules will not be tolerated. As a result, true competition in the MVPD marketplace will be facilitated.

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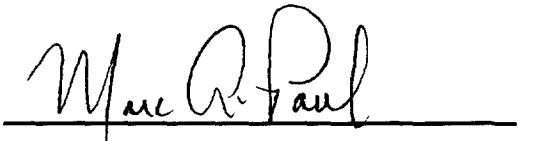
[27] For the same reasons, EchoStar urges the Commission to extend this presumption not only to programmers that move their programming from satellite delivery to terrestrial delivery, but also to programmers that initially provide their programming on a terrestrial basis.

[28] The Internal Revenue Service routinely requires a legitimate business purpose in certain situations to ensure that companies are not engaging in transactions for the purpose of avoiding its rules. See Treas. Reg. §1.355-2(b) ("The potential for the avoidance of Federal Taxes by the distributing or controlled corporations. . .is relevant in determining the extent to which an existing corporate business purpose motivated the distribution.").

Respectfully submitted,

EchoStar Communications Corporation

By: 

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Dated: February 2, 1998

DECLARATION OF DAVID K. MOSKOWITZ

My name is David K. Moskowitz and I am Senior Vice President and General Counsel to EchoStar Communications Corporation ("EchoStar"). I hereby declare under penalty of perjury that the information contained in the foregoing Comments of EchoStar is true and correct to the best of my knowledge and belief.

David K. Moskowitz
Senior Vice President and General Counsel
EchoStar Communications Corporation

Executed on: 2-2-98

CERTIFICATE OF SERVICE

I, Marc A. Paul, hereby declare that the foregoing Comments of EchoStar Communications Corporation was sent this 2nd day of February, 1998, by messenger (indicated by *) or first-class mail to the following:

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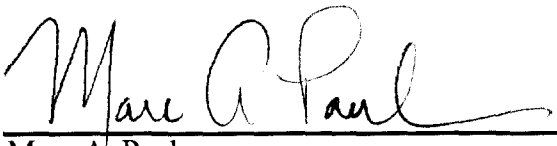

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